Office - Supreme Court, U.S.
FILED
JUN 27 1957
JOHN T. FEY, Clerk

No. [redacted] 229

In the Supreme Court of the United States

OCTOBER TERM, 1956

FEDERAL TRADE COMMISSION, PETITIONER

v.

JAMES F. CRAFTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
CHARLES H. WESTON,
Attorney,
Department of Justice, Washington 25, D. C.

EARL W. KINTNER,
General Counsel,
ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission,
Washington 25, D. C.

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The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above cause on February 27, 1957.

OPINION BELOW

The District Court did not render an opinion. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 11–36) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1957 (Appendix B, *infra*, p. 37). The time for filing a petition for writ of certiorari was extended by Mr. Justice Douglas on May 21, 1957, to June 27, 1957 (Appendix C, *infra*, p. 38).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an action to enforce a subpoena issued by the Federal Trade Commission in a proceeding to determine whether an insurance company is violating Section 5 of the Federal Trade Commission Act may properly be ordered dismissed by a court of appeals because of its conclusion of law that such proceeding is, in whole or in part, not within the Commission's statutory authority.

STATUTES INVOLVED

The Federal Trade Commission Act of September 26, 1914, 38 Stat. 717, as amended, 66 Stat. 632, provides in part as follows:

> SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. [15 U. S. C. 45 (a) (1)]
>
> * * * * *
>
> SEC. 9. For the purposes of this Act * * * the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. * * *.
>
> * * * * *
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to

appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. [15 U. S. C. 49]

* * * * *

Section 2 of the Act of March 9, 1945, 59 Stat. 34, as amended, 61 Stat. 448, 15 U. S. C. 1012, provides in part:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, * * * the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

STATEMENT

In this case, the Federal Trade Commission issued a complaint alleging that Fireman's Fund Indemnity Company (Indemnity Company), a California corporation licensed to do business in all 48 states and the District of Columbia, had been disseminating in interstate commerce and through the United States mails advertising material which made false and misleading representations concerning the terms and conditions

of contracts of insurance which it entered into in the various states (R. 8–10).[1] The complaint charged that Indemnity Company thereby used unfair and deceptive acts and practices in interstate commerce prohibited by the Federal Trade Commission Act (R. 16). The complaint also alleged that Indemnity Company was making insurance contracts in various states "in which the business of insurance is not regulated by state laws to the extent of regulating the practices of respondent alleged in this complaint to be illegal" (R. 9).

The Commission issued a subpoena to respondent, the president of Indemnity Company, to appear at the hearing of this complaint to testify at the instance of the Commission and to produce designated books and records of Indemnity Company (R. 20–21). On respondent's motion to quash, counsel for the Commission stated that they did not require the production of information relating to intrastate transactions within California, and the hearing examiner ordered such data excluded from the scope of the subpoena (R. 27, 42, 91). Respondent appeared at the hearing and stated that he had in two brief cases the available material called for by the subpoena (R. 34), but he refused to testify or to produce this material upon the ground that the Commission had no jurisdiction to maintain the proceedings against Indemnity Company (R. 37, 42–43).

On the Commission's application to the District Court (N. D. Cal.) under Section 9 of the Trade Commission Act, the court entered an order enforcing

[1] We use the designation "R." to refer to the printed transcript of record in the court below.

compliance with the Commission's subpoena (R. 46–47). The Court of Appeals, in an opinion by Judge Fee, reversed and directed dismissal of the enforcement proceeding. The grounds of decision are not entirely clear. The court referred to the proviso of Section 2 (b) of the McCarran-Ferguson Insurance Regulation Act—that the Federal Trade Commission Act shall be applicable to the business of insurance "to the extent that such business is not regulated by State law"—and said that it would be improper to rule upon the limits thereby set on the Commission's authority "except insofar as these may affect breadth of the demand of the subpoena" (*infra*, p. 30). The court then held that the subpoena was "too broad" since it "demanded in mass all books, papers and records of the Indemnity Company including those relating to the intrastate business of that company in California * * *" (*infra*, p. 35). According to the court, "the subpoena was so broad on its face * * * that it would have been almost impossible to frame appropriate phrases of limitation" (*infra*, p. 34), and it was invalid *in toto* because "the phraseology was such that the court had no means of segregation of items, if any, over which the Commission had jurisdiction from those as to which Congress had explicitly denied them authority" (*infra*, pp. 35–36).

REASONS FOR GRANTING THE WRIT

It is settled that, where the respondent in an administrative proceeding raises an issue as to "coverage" of the applicable statute, initial determination of this issue is to be made by the agency and not by a court on application to enforce an administrative

subpoena. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501; *Oklahoma Press* v. *Walling*, 327 U. S. 186. The rationale of these decisions is that Congress, when it provides for administrative enforcement of a statute, empowers the administrative agency to determine initially whether particular conduct comes within the statutory prohibitions. In *Endicott Johnson*, this Court held that a district court may not rule on this question in a proceeding to enforce an administrative subpoena, thereby "anticipating and foreclosing" administrative determination, and disabling the administrative agency "from rendering a complete decision on the alleged violation as Congress had directed". 317 U. S. at 509.

If the court below had dismissed the proceeding upon the ground that the demand was for documents relating to a matter not within the Commission's statutory authority, this would plainly be in conflict with *Endicott Johnson* and *Oklahoma Press*. The apparent ground of dismissal in this case—that the demands of the subpoena did not permit differentiation between documents pertaining and those not pertaining to matters upon which the Commission was authorized to act—is equally grounded upon the court's view as to the limits of the administrative agency's statutory authority, and equally interferes with obtaining information pertinent to the question of violation of the statute. Indeed, if it is error to deny subpoena enforcement upon the ground that the information sought relates to a matter not within the statutory prohibition, *a fortiori* it is error to deny enforcement upon the ground that the information

sought relates *in part* to matters not within the statutory prohibition.

The court below said that *Endicott Johnson* and other like decisions dealt with the "coverage" of the applicable statutes, and were not applicable where the issue was the "jurisdiction" of the administrative agency (*infra*, pp. 27, 31). We submit that the court's suggested distinction is a purely verbal one. The statutory authority of the administrative agency is equally involved whether phrased in terms of the statute's "coverage" or in terms of the administrative agency's "jurisdiction".

While a court may properly deny enforcement of an administrative subpoena when the evidence sought is "plainly incompetent or irrelevant to any lawful purpose" of the agency (317 U. S. at 509), here the statute explicitly makes the Federal Trade Commission Act applicable to the business of insurance under some circumstances. The Commission's subpoena sought information material to determining the applicability of the Act. If the Commission, after obtaining such information, should resolve that issue erroneously and issue an order which transcends its statutory authority, the order can be modified or set aside on judicial review.

Here there is no question of an excessive or burdensome demand. When respondent appeared at the Commission hearing, the material demanded was already assembled and contained in two brief cases (*supra*, p. 4). Compare *Civil Aeronautics Board* v. *Hermann*, 353 U. S. 322, reversing *per curiam* 237 F. 2d 359 (C. A. 9).

In stating that the records and documents demanded included those "relating to the intrastate business" of Indemnity Company in California (*infra,* p. 35), the court below was plainly in error. As already noted (*supra,* p. 4), the hearing examiner limited the demand to data relating to interstate transactions. Throughout the entire proceeding, this fact was known, understood, and accepted by all parties. The Commission's counsel had informed respondent when he appeared at the Commission hearing that the Commission was not seeking information concerning "the dissemination of advertising or sales in California" (R. 42). During argument in the District Court, counsel for the respondent stated that "they don't claim any jurisdiction in California" and "So the examiner has said they cannot produce evidence of our transactions in California" (R. 91). And, in his brief in the court below (pp. 3, 4), respondent pointed out that the Commission was not asserting jurisdiction "as to California," and that the hearing examiner had granted his motion to quash the subpoena to that extent. In any event, even assuming *arguendo* that the Commission had sought intrastate data, the Court of Appeals should have narrowed the scope of the subpoena instead of dismissing the proceeding. Moreover, the subpoena sought testimony from respondent as well as documents, and any defect in the demand for documents could not excuse respondent from testifying.

Under the decision below, the Commission is for all practical purposes precluded from developing the facts on the basis of which it can be determined

to what extent the Commission has jurisdiction over the business of insurance. The Commission has filed 41 complaints against insurance companies charging violations of the Federal Trade Commission Act, in thirteen of which proceedings cease and desist orders already have been issued. The decision, if allowed to stand, is likely to encourage resistance to subpoenas in the pending cases against insurance companies. Nor is the effect of the decision confined to proceedings against insurance companies. It can be cited as an authority in any subpoena enforcement proceeding in which the "jurisdiction" of the Federal Trade Commission or that of another administrative agency is drawn in issue.

Orders of the Commission directed against insurance companies have been passed upon in two recent cases: *American Hospital and Life Insurance Co.* v. *Federal Trade Commission,* No. 16132, decided by the Court of Appeals for the Fifth Circuit on April 9, 1957; and *National Casualty Co.* v. *Federal Trade Commission,* No. 12944, decided by the Court of Appeals for the Sixth Circuit on June 6, 1957. The former case held that the Commission was without jurisdiction of the acts of which it complained, but in the latter case the court recognized the Commission's jurisdiction over acts of insurance companies in states which did not have a statute prohibiting unfair or deceptive acts or practices by insurance companies, and the court remanded the cause to the Commission for further proceedings.

irrespective of the correctness of those decisions[2] in interpreting the scope of the Commission's authority under the McCarran-Ferguson Insurance Regulation Act, enforcement of subpoenas issued by the Commission in proceedings against insurance companies remains a matter of major importance.

CONCLUSION

We believe that the decision below is clearly erroneous and that the questions presented have already been authoritatively settled by this Court. It is suggested, therefore, that the Court may consider it appropriate to grant certiorari and reverse the judgment without further briefs or argument. Cf. *Federal Trade Commission* v. *Carter Products, Inc.*, 346 U. S. 327; *Federal Trade Commission* v. *American Crayon Co.*, 350 U. S. 907, 352 U. S. 806; *Federal Trade Commission* v. *Sewell*, No. 823, this Term, decided May 27, 1957.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

CHARLES H. WESTON,
Attorney.

EARL W. KINTNER,
General Counsel,

ROBERT B. DAWKINS,
Assistant General Counsel,
Federal Trade Commission.

JUNE 1957.

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[2] The Government is at present considering whether to apply for certiorari in these two cases.

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: LEMMON, FEE and CHAMBERS, *Circuit Judges*

JAMES ALGER FEE, *Circuit Judge:*

This is an appeal from an order enforcing a subpoena duces tecum issued by the Federal Trade Commission to Crafts in a proceeding against Fireman's Fund Indemnity Company. The trial court issued an order as follows:

> "ORDER REQUIRING THE GIVING OF EVIDENCE AND THE PRODUCTION OF DOCUMENTARY EVIDENCE
>
> "The Federal Trade Commission, having invoked the aid of this Court in requiring the attendance and testimony of James F. Crafts and the production of documentary evidence by James F. Crafts, as a witness in a proceeding instituted by the Federal Trade Commission against Fireman's Fund Indemnity Company (D. 6310), and
>
> "The Court having considered the application, it is hereby
>
> "Ordered: That the application be, and the same hereby is granted, and that the said James F. Crafts be, and he is, hereby ordered to appear upon not less than ten days' notice at a time and place to be set by the Federal Trade Commission or a Hearing Examiner thereof designated by the said Commission to take testimony and receive evidence, and to perform all other duties authorized by law in the prosecution of the inquiry pending before said Com-

mission entitled, 'In the Matter of Fireman's Fund Indemnity Company, a corporation, Docket No. 6310,' or an examiner subsequent hereto designated by it for such purposes, to give evidence and testimony at the aforesaid time and place touching matters brought in question by the complaint of the Federal Trade Commission against Fireman's Fund Indemnity Company, a corporation, and the answer thereto, to then and there produce the documentary evidence identified and described in a subpoena issued by the said Commission, on September 22, 1955, and already served upon said James F. Crafts, and which the said James F. Crafts has not produced, and to answer at said time and place every question relevant and material to said proceeding and necessary and proper to the conduct thereof and to attend before said Examiner of the Federal Trade Commission from day to day until his examination shall have been completed.

"It Is Further Ordered: That this Order and its effectiveness be and the same is hereby stayed for the time permitted by law for an appeal therefrom, and if such appeal is filed, thereafter until final determination of such appeal."

The subpoena which was thus enforced read:

"United States of America Federal Trade Commission

"SUBPOENA DUCES TECUM

"To Mr. JAMES F. CRAFTS, Fireman's Fund Indemnity Company, 401 California Street, San Francisco 20, California.

"You are hereby required to appear before J. Earl Cox, a Hearing Examiner of the Federal Trade Commission, at Room 261, U. S. Post Office and Court House, 7th and Mission Streets in the City of San Francisco, Cali-

fornia, on the 17th day of October, 1955, at ten o'clock a.m., of that day, to testify at the instance of the Federal Trade Commission in the Matter of Fireman's Fund Indemnity Company, Docket No. 6310, and you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: described in Schedule 'A' attached hereto and incorporated by reference as if fully rewritten herein.

"Fail not at your peril.

"In testimony whereof, the undersigned, a Hearing Examiner of the Federal Trade Commission, has hereunto set his hand and the said Federal Trade Commission has caused its seal to be affixed at Washington, D. C., this 22nd day of September, 1955.

[SEAL] /s/ J. EARL COX,
Hearing Examiner.

"Schedule 'A'

"1. One copy of each form letter, bulletin, circular, folder, brochure, stuffer, newspaper advertisement, magazine advertisement, or other written or printed advertising material which was disseminated by respondent Fireman's Fund Indemnity Company (hereinafter described in this Schedule 'A' as respondent) to the general public, or to its employees or agents for dissemination to the general public or which was disseminated to the general public by any person, partnership, or corporation with the permission of, request of, order by, or under the terms of any contract with the respondent from March 1, 1954, to date, which advertised, described, or related to any of the accident and health insurance policies named in the complaint or any policies issued by the respondent since March 1, 1954, as substitutes or modifications for such policies.

"2. All contracts, memorandums of agreement, or correspondence between respondent,

its officers, agents, employees, or contractors, or any records, books of accounts, or verified summaries thereof which have reference to the following listed advertisements and which show on a state by state basis volume of dissemination of such advertisements by respondent to the general public or to its agents for redissemination to the general public during the years 1953 and 1954.

1. Form letter of A & H No. 2.
2. Form letter of A & H No. 7.
3. Form letter of A & H No. 9.
4. Form letter of A & H No. 10.
5. Circular bearing form No. A & H 4800.
6. Postcard bearing form No. A & H 4800–A.
7. Circular bearing form No. A & H 4801.
8. Postcard bearing form No. A & H 4801–A.
9. Circular bearing form No. A & H 4803.
10. Postcard bearing form No. A & H 4803–A.
11. Pamphlet bearing form No. A & H 4804.
12. Pamphlet bearing form No. A & H 4807.

"3. One specimen copy of each accident and health insurance policy issued by respondent since March 1, 1954, as a substitute or modification for any of the accident and health insurance policies named in the complaint.

"4. Original books, records, or accounts of the respondent, or verified summaries thereof, showing: the dollar volume of the premium receipts received by it from insureds residing in each of the several states of the United States and in the District of Columbia during the years 1953 and 1954 to whom respondent has issued during those years one or more of the following listed policies on a family or group basis; or the total number of such policies is-

sued by respondent during the years 1953 and 1954 in each of the several states of the United States and the District of Columbia:

1. The Basic Equity Accident Policy (No. BA).
2. The Basic Income Equity Accident Policy (No. BAI).
3. The Basic Equity Life and Limb Accident Policy (No. BAL).
4. The Basic Health Policy (No. BHP).
5. The Budget Hospital and Medical Policy (No. GMA).
6. The Hospital Nurses and Expense Policy (No. HNE).
7. Hospital and Medical Policy (No. IMH).
8. Polio Policy (No. PS).

"[Endorsed]: Filed October 18, 1955."

The complaint in the original proceeding is of extremely broad scope:

"United States of America Before Federal Trade Commission

Docket No. 6310

"In the Matter of:

FIREMAN'S FUND INDEMNITY COMPANY, a Corporation

"COMPLAINT

"Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U. S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fireman's Fund Indemnity Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding

by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

"Paragraph One: Respondent, Fireman's Fund Indemnity Company, is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 410 California Street, San Francisco, California.

"Paragraph Two: Respondent is now, and for more than two years last past has been, engaged as an insurer in the business of insurance in commerce, as 'commerce' is defined in the Federal Trade Commission Act, by entering into insurance contracts with insureds located in various States of the United States in which the business of insurance is not regulated by state law to the extent of regulating the practices of respondent alleged in this complaint to be illegal. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said insurance policies in commerce between and among the several States of the United States.

"Respondent, during the two years last past, has sold insurance indemnification in a variety of policies, among which are the following:

1. The Basic Equity Accident Policy (No. BA).
2. The Basic Income Equity Accident Policy (No. BAI).
3. The Basic Equity Life and Limb Accident Policy (No. BAL).
4. The Basic Health Policy (No. BHP).
5. The Budget Hospital and Medical Policy (No. GMA).
6. The Hospital Nurses and Expense Policy (No. HNE).

7. Hospital and Medical Policy (No. IHM).
8. Polio Policy (No. PS).

"Paragraph Three: Respondent is licensed, as provided by the respective State laws, to engage in the business of insurance, as heretofore generally described, in all of the forty-eight States of the United States and the District of Columbia.

"Paragraph Four: In the course and conduct of its aforesaid business, respondent, during the two years last past, disseminated, and caused to be disseminated, in the form of printed and written matter, false, misleading and deceptive advertising statements concerning the terms and provisions of its contracts of insurance, as reflected by policies as aforesaid. These statements were disseminated by letters, bulletins, circulars, etc., through the United States mail and by other means; or through its agents in commerce, between and among the various States of the United States. The purpose and effect of these statements was and is to induce members of the public to become insured by the respondent under the terms and provisions of the policies advertised.

"Paragraph Five: In the course and conduct of its said business in said commerce, as aforesaid, the respondent has disseminated, among others of similar import and meaning, not herein set out, advertisements relating to its said policies containing the statements hereinafter set forth:

1. 'Available to Males ages 18-54 . . . Females 18-54 . . . Renewable to age 70.'
2. 'A Perfect Combination for Full Coverage Disability Insurance.'

'Let Accident and Health Insurance Protect Your Income as Fire Insurance Protects Your Home.'

'Adequate Sickness Protection Combined With Sound Accident Insurance.'

'Basic Coverages

Hospital Confinement cases:	Benefits Plan A
1. Hospital room and board for a period not exceeding 100 days for any one disease or injury,	
Adults, per day up to	$5.00
Children, per day up to	4.00
2. Actual expense incurred for operating room, anaesthesia, anaesthetist's fee, drugs, dressings, diagnostic X-ray and laboratory examinations, up to an aggregate maximum of	100.00
Ambulance Expense:	
Transportation to or from the hospital, up to	15.00'

'Optional Coverages

Surgical Operation Expense:	
Whether at hospital, doctor's office or home, schedule up to	$250.00
Housewives and Unemployed Females	187.50
Doctor's Visits During Hospital Confinement	
In non-surgical cases, reimbursement will be made for physician's fees up to a maximum of 100 days for each disease or injury, per day up to	3.00'
4. 'Loss of Business Time Weekly Income up to 52 Weeks	
Confining Illness Coverage from first day or with waiting period of 7, 14, 21 or 28 days.	

"Paragraph Six: Through the use of such statements and representations, and others of similar import and meaning, not specifically set out herein, the respondent represents and has represented directly or by implication, with respect to said policies of insurance, as follows:

1. That the policies providing indemnification against loss caused by accident or sickness may be continued at the option of the insured to a specific age or for life as long as the insured makes such premium payments within the time and in the

amounts as are required by the terms of the policy.

2. That complete indemnification is provided for any or all sickness, illnesses or accidents suffered by the insured.

3. (a) That indemnification is provided in the form of cash benefits for the payment of hospital room and board at the rate of $5.00 per day for a period not to exceed 100 days for any one disease or injury which may be suffered by the insured.

(b) That indemnification in the form of cash benefits in an amount up to $250.00 is provided for surgical expense incurred by the insured as a result of illness or injury.

(c) That indemnification is provided for doctors' visits in non-surgical cases during hospital confinement at the rate of $3.00 per day for a maximum 100 days for each sickness or injury suffered by the insured.

4. That indemnification is provided for any confining sickness which may be suffered by the insured during the policy term from the first day of such sickness or after a waiting period of 7, 14, 21, or 28 days as the policy may prescribe.

"Paragraph Seven: The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Contrary to the statements made in paragraph 1 of Paragraph Five, respondent's policies may not be renewed at the option of the insured until the age of 70 years or any other specific age by the timely payment of premiums in the amounts required by such policies. On the contrary, respondent's policies provide, in effect, that they are subject to cancellation by the respondent at any time for any reason or for no reason at all.

2. Contrary to the statement made in subparagraph 2 of Paragraph Five concerning respondent's Basic Health Policy and Basic Equity Accident Policy, the insured is not provided with complete indeminfication by such policies against any loss which may be incurred by reason of any or all sicknesses or accidents. For example, Respondent's Basic Health Policy provides, (a) in effect, that no cash benefits are payment for any loss due to sickness the cause of which is traceable to a condition existing prior to or within 15 days after the effective date of the policy; (b) any loss due to pregnancy, childbirth or miscarriage; and (c) suicide or any attempt threat, death, disability or other loss caused or contributed to, by disease or infection (except pyogenia infection) or injury sustained by the insured while in or on any aircraft or other device for air travel. Total disability benefits are only provided if the disability wholly and continuously disables the insured and prevents the insured from performing each and every duty pertaining to his occupation. Further, such total disability must occur within 30 days of the date of the accident.

3. Contrary to the statements made in subparagraph 3 of Paragraph Five:

(a) Respondent's Hospital and Medical Expense Policy (as referred to in subparagraph 3 (1) of Paragraph Five) does not provide indemnification for hospital room and board for a period not to exceed 100 days for any one disease or injury. On the contrary, such policy does not cover losses resulting from any illness the cause of which is traceable to a condition existing prior to or within 30 days of the effective date of the policy. Further, the

policy does not provide for the payment of cash benefits for losses resulting from insanity, pregnancy or childbirth, or any condition resulting therefrom; intentional self-inflicted injuries; or operations for removal of tonsils or adenoids, or both, upon children up to the age of 18; unless the policy has been in effect for at least 12 consecutive months. Also, it is to be noted that the policy provides that benefits payable thereunder shall be reduced 25% when the insured reaches 60 years of age and 50% when the insured reaches 65 years of age.

(b) Respondent's Hospital and Medical Expense Policy does not cover any surgical expense which may be suffered by the insured by reason of sickness or accident in all cases to a maximum of $250.00. The surgical benefits provided by the policy, if payable at all, are limited to the maximum amounts stated in the schedule of operations (Rider Form MSE) contained in the policy. This schedule lists 114 different types of operations. A maximum of $250.00 will be payable for surgical fees for only four of these types of operations. A maximum of $75.00 or less is provided for 90 of the listed types of operations.

(c) Respondent's Hospital and Medical Policy does not provide indemnification for doctors' visits to the insured during hospital confinement in all non-surgical cases. Instead, such policy excludes indemnification for this expense in many instances for the reasons previously stated in subsection (a) of this section.

4. Contrary to the statements contained in subparagraph 4 of Paragraph Five (which refer to respondent's Basic Health Policy) indemnification is not provided for the first day of any illness which may be

contracted by the insured during the policy term. Instead, such policy excludes payment for losses resulting from any sickness the cause of which originates on or prior to fifteen days after the effective date of the policy.

"Paragraph Eight: The use by the respondent of the aforesaid false and misleading statements and representations with respect to the terms and conditions of its said policies and its failure to reveal the limitations of said coverage found in said policies have had and now have the tendency and capacity to mislead and deceive and have misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the aforesaid statements and representations were and are true and to induce said portion of the purchasing public to purchase insurance coverage from the respondent because of said erroneous and mistaken belief.

"The aforesaid acts and practices of respondent, as herein alleged, are all to the prejuduce and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

"Wherefore, the Premises Considered, the Federal Trade Commission, on this 11th day of March, A. D. 1955, issues its complaint against said respondent."

Crafts appeals, claiming it is not shown that the proceeding lies within the power of the Commission and that the testimony and exhibits demanded are therefore not shown to be relevant to any inquiry within the jurisdiction of the administrative body to conduct. No claim of personal privilege is made.

The proceeding raised the question of whether Congress had not totally proscribed action by the Commission in the insurance field, albeit trafficking across

state lines in insurance now constitutes interstate commerce.[1] It must be determined at the outset whether the demand of the subpoena related specifically to any books, documents or other papers, the production of which the Commission had a right to require from this corporation or its officers, as being within the closely circumscribed area which Congress may have left remaining for Commission action as to insurance.

The two bases for the claim of the Commission that the order should be upheld cut diagonally across these fields.

First, it is said that the District Court had no authority to determine whether the Commission was empowered to bring the proceeding and issue the subpoena, and, second, it is argued that the only question involved is one of "coverage," which must be left to the discretion of the Commission. It will be demonstrated that neither of these contentions is sound. As paraphrased by the agency brief, the trial court took the position that "the subpoena must be enforced without deciding whether the appellant is covered by the statute, provided the subpoena is relevant to a legitimate field of inquiry and is otherwise reasonable." But it must be pointed out that even this test, so loosely defined, was not really employed by the trial court in the instant case.

The present proceeding to enforce the subpoena was frankly initiated in order to gain complete disclosure of all records by Fireman's Fund Indemnity Company without settling the question of the authority of the Commission to investigate that company in their present proceeding. Indeed, as noted above, the claim was made and was apparently accepted by the

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[1] *United States* vs. *South-Eastern Underwriters Association*, 322 U. S. 533, rehearing denied 323 U. S. 811.

trial judge that the District Court had no jurisdiction to consider whether the Commission had power to investigate this particular corporation at all. It is urged by the agency that this Court accept the interpretation of the Commission of its own powers for the purpose of making the investigation and that the breadth thereof can be reviewed when the final order in the main proceeding is attacked. We reject this limitation upon the jurisdiction of the trial court.

It cannot be too often reiterated that the attempt to enforce an administrative subpoena initiates a case or controversy.[2] All questions relating to jurisdiction of the court, authority of the administrative body, reasonableness of the demand under all the circumstances, with regard for due process and protection of individual rights, and relevancy of the testimony and documents demanded are justiciable. Since the Commission was asking for relief of an affirmative nature, it was incumbent upon that agency to establish affirmatively its legal power to act in the field, among other essentials. The postulate upon which any jurisdiction to act in the field of interstate commerce by the Commission depends is that Congress had not explicitly excluded such action by specific statute. The power of Congress to exclude completely such action under the Commerce Clause of the Federal Constitution cannot be denied. If the Commission were then precluded from regulation by Congress, it would have no power to act and the court would be bound so to declare.

The jurisdiction of the District Court and the extent of the area denied by Congress to the Commission in regulation of insurance in interstate commerce are the cardinal questions here. Therefore, the decision

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[2] *Interstate Commerce Commission* vs. *Brimson*, 154 U. S. 447, 489.

here is not affected by the principles set forth in cases recently decided by this Court. In these decisions, the element of personal privilege, the right of privacy, the right of a person to be secure from a general search and seizure and not to be required to be a witness against oneself as constitutionally guaranteed were discussed.[3] Here, as noted above, no claim of

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[3] These decisions turn on the propriety of judicial enforcement of subpoenas issued by various administrative agencies in the light of claims of personal privilege or privacy by those directly involved or by third parties to the proceeding. In *Boren* vs. *Tucker*, 9 Cir., No. 15010, filed December 3, 1956, it was held, so far as is important here, that the subpoena was reasonable in that the evidence sought was sufficiently material and relevant to the tax liability of the defendant taxpayers. In *Chapman* vs. *Maren Elwood College*, 9 Cir., 225 F. 2d 230, the denial of enforcement of a subpoena issued by the Veterans Administration was affirmed, as the subpoena was found, on the facts, to reach unreasonably far back in time.

Three cases involve the rights of third persons to protection where the administrative agency is authorized to investigate another directly. The question presented is whether a general, rather than specific, demand allows the third person to raise questions of personal privilege and avoid disclosure which might tend to incriminate him. Enforcement of a Civil Aeronautics Board subpoena was reversed and the case remanded in *Hermann* vs. *Civil Aeronautics Board*, 9 Cir., 237 F. 2d 350, in part because the District Court failed to pass upon privilege asserted by third parties to the proceeding in behalf of documents relating "entirely to their personal affairs, such as their income tax reports." A similar result obtained in Local 174, International Brotherhood of Teamsters, 9 Cir., No. 14746, filed November 8, 1956, where the subpoena issued by the Internal Revenue Service to the Local, a third party to the tax investigation of another, was so broad on its face as to compel a holding that the District Court had not given consideration to the right of privacy of the Local. Likewise, this Court, in *Hubner* vs. *Tucker*, 9 Cir., No. 14704, filed January 30, 1957, set aside a contempt order imposed against defendant, a third party to a tax investigation for failure to obey the

any personal privilege or right is made. The issue is essentially one of authority to determine jurisdictional questions.

There are three separate questions in this case which were before the trial court. First, did the Federal Trade Commission have any authority to demand production of any papers whatsoever from Fireman's Fund Indemnity Company? Second, has the Commission any power over the subject matter of the inquiry? Third, was the subpœna definite enough to show all the material demanded was relevant to any inquiry which the Commission was empowered to conduct?

The question of whether either Indemnity or Crafts was covered by an act, regulation or statute personally was really not involved or, perhaps we may rather say, was entirely a dependent proposition which could only be solved by a determination of whether Congress had precluded the Commission from acting in the particular field. The trial court refused to consider the scope of authority of the Commission, the relevancy of the testimony or documents to any inquiry which the agency had the authority to conduct and the arbitrary nature of the demand considering that Congress may have prohibited action or

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subpoena issued by the Internal Revenue Service, and remanded the case. It was held that the blanket demand, by its very breadth, precluded the defendant from effectively raising the defense of unlawful search and seizure and the privilege against self-incrimination.

It should be noted that, in all these cases, there was no question raised as to the broad legal authority of the various agencies involved to issue subpoenas, and to have them enforced: "coverage" was not an issue in any of them. Rather, the issues raised in these enforcement proceedings concern more particular problems, such as what may be subpoenaed, from whom, and in what manner.

at least closely circumscribed action in this field of interstate commerce by the Commission.

But at the threshold of any inquiry a District Court must consider not only its own jurisdiction, but also the authority of any agency to act which seeks relief before it.[4] The idea that a fiat of an administrative agency that it possesses authority to act in a particular field is sacrosanct is illusory. In certain statutes, Congress has permitted an agency to determine conclusively whether a certain person or state of facts comes within the orbit of its administrative power.[5]

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[4] *Jones* vs. *Securities and Exchange Commission*, 298 U. S. 1. A leading "coverage" case indicates that evidence sought by subpoena cannot be "plainly incompetent or irrelevant to any lawful purpose" of the agency. *Endicott Johnson Corporation* vs. *Perkins*, 317 U. S. 501, 509. As the District Court stated in Application of Barnes, 116 F. Supp. 464, 467, ultimately affirmed sub. nom. *United States* vs. *Minker*, 350 U. S. 179, "Subpenas should not issue on hit or miss legal grounds." See also cases where enforcement was denied on analogous legal grounds: *Cudahy Packing Co.* vs. *Holland*, 315 U. S. 357 (improper delegation of subpoena power); cf. *Ellis* vs. *Interstate Commerce Commission*, 237 U. S. 434; *Harriman* vs. *Interstate Commerce Commission*, 211 U. S. 407 (witnesses not required to answer questions outside the scope of the statutory authority of the Commission).

[5] See, for example, *Endicott Johnson Corporation* vs. *Perkins*, 317 U. S. 501, so holding as to the Walsh-Healy Public Contracts Act, 41 U. S. C. A. § 38, and *Tobin* vs. *Banks and Rumbaugh*, 5 Cir., 201 F. 2d 223, cert. den. 345 U. S. 942, so holding as to the Fair Labor Standards Act, § 9, 29 U. S. C. A. § 209.

The trial court was impressed with the rationale of these cases and treated the question raised in the instant case as one of "coverage." The government has cited a wealth of cases on this point, which have properly treated "coverage" questions following the same line of reasoning. These are not applicable here. In each of them Congress had vested an agency with regulatory power in a broad field, and the particular question was whether some individual or entity was within or without the field. The agency was given primary jurisdiction to reach

But those instances are not analogous to the instant proceeding.

Here the trial court places an imprimatur upon each demand of the subpoena without any consideration of the limitations upon the power of the agency to act. However, Congress had passed an act specifically stating its position with regard to the business of insurance, which reads in part:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> "SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> "(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically related to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by

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a tentative conclusion and subpoenaed records to prove the fact of coverage. But here Congress has severely circumscribed, if not destroyed the power of any agency to enter the field, if the regulation by a particular state is sufficiently comprehensive.

State law." McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, 15 U. S. C. A. §§ 1011–1012.

In the face of this statute, the Commission has decided by a vote of three to two that it has a broad and uncontrolled power to regulate the business of insurance.[6] This result seemingly was reached by rationalization from the terms of the statute. However, it is not the intention to attempt to construe the statute because the demand of the subpoena is so broad and general that such a holding is not compelled here.

The appellant Crafts, contrary to the Commission, claims that California is the state of origin of the company and that the operations of the company with regard to advertising are completely regulated by the law of that state.[7] It is urged that California has the complete control of the existence of the corporation and may revoke its charter for violations of the laws, even if the particular act may have occurred in another state, federal district or foreign country.[8] Nor, it is claimed, is this a dry letter of the enactment, since the proper officers do enforce such regulations upon violations outside the state.[9] Furthermore, it is said, practically every state in the Union and the District of Columbia have statutes which regulate and control the advertising of the persons and corporations, domestic or foreign,

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[6] *In the Matter of American Hospital and Life Insurance Company*, F. T. C. Docket No. 6237, decided April 24, 1956.

[7] Cal. Stat. (Insurance Code) (West, 1956) §§ 780, 781.

[8] Cal. Stat. (Insurance Code) (West, 1956) §§ 704, 783.5.

[9] Appellant draws our attention to the pending case of *Foster* vs. *McConnell*, Docket No. 422572, in Superior Court at San Francisco, in which this application of the statutes is being tried.

doing insurance business in the state or district.[10] It is urged upon us that these are purely questions of law and that therefore it is incumbent upon this Court to decide now just what are the limitations, if any, upon the power of the Commission. We hold it improper for us to rule upon the questions thus presented in this ancillary case except insofar as these may affect breadth of the demand of the subpoena.

That there are limitations upon the power of the Commission in this field is beyond all doubt. It is apparently conceded by everyone that the agency had no power to inquire into the advertising of this corporation in the State of California. Indeed, it is stated that some such limitation was placed upon the claim to discovery by the trial examiner and affirmed by the Commission. It has also been stated by counsel that the agency has no interest in discovery as to this area. But this Court cannot consider this as a supposition or admission. The trial court enforced the subpoena as it read without qualification or exception. This was error.

The entire complaint in the proceeding is predicated upon the overriding authority of the Commission to regulate and punish advertising in the business of insurance which may affect interstate aspects thereof in accordance with the ruling by that body, split three to two.[11]

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[10] Almost four-fifths of the states have adopted, with minor variations, the so-called "Model Act," which was drafted by the National Association of State Insurance Commissioners and provided for the regulation of trade practices. See R. C. W. §§ 48.30.010–48.30.250. The remaining states all have statutory provisions regulating to various degrees deceptive representations or advertising.

[11] *In the Matter of American Hospital and Life Insurance Company*, F. T. C. Docket No. 6237, decided April 24, 1956.

When the Congress passes an act which is intended to cure an evil legislatively designated and defined, the courts will not circumscribe the sphere of action of the agency. Here the Commission acts within the scope of power conferred by a general statute which purports to confer authority "to prevent * * * corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." [12] This Act covers a broad field and unquestionably sets out a legislative purpose of great public importance. As such, the legislation has been upheld and broadly enforced by the courts. Yet even the Commission will not contend that this legislation is of universal application to all corporations, persons and partnerships in the United States. Indeed, before the decision of the Supreme Court of the United States in *United States* vs. *South-Eastern Underwriters Association,* 322 U. S. 533, the Commission had never attempted to exercise this authority against insurance companies. If such an attempt had been made before that time, surely no claim could have been made that an insurance company could not resist the investigation at the outset on ground that the Commission had no jurisdiction. This consideration highlights the proposition that the primary question for a court here is jurisdictional and does not involve coverage.[13]

This point serves to distinguish all legislation and all decisions thereon where the particular entity may or may not be as a matter of fact within the general sweep of power conferred.[14] Where Congress has conferred broad authority upon an agency to exercise

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[12] Federal Trade Commission Act, § 5 (a) (6), as amended July 14, 1952, 66 Stat. 632, 15 U. S. C. A. § 45 (a) (6).

[13] See cases at Note 4, supra.

[14] See cases at Note 5, supra.

regulatory power over a legislative classification such as interstate commerce, the question as to whether the entity or person subpoenaed is within the classification and thus subject to administrative control is one of "coverage." As it is a question of fact, the agency usually has complete power of determination, and the courts cannot interfere. As to many fields, the Commission has such unhampered power in regulation of interstate commerce.

Here Congress had plenary power to refuse to occupy the field of regulation of insurance in interstate commerce. Whether the refusal was complete with a clause of re-entry left for future contingency or whether a considerable area was left for present regulation by the Commission, we do not attempt presently to decide. But the determination involves a question of law. The jurisdiction of the Commission certainly was drastically circumscribed in this field in any event. How far the prohibition has gone is dependent upon a construction of this act of Congress and the statutes of the several individual states regulating insurance. It may be conceived the actual practice in insurance regulations of a particular state may become pertinent eventually, but such matter will still relate to jurisdiction of the Commission and not to "coverage."

Patently, the power of the Commission to act at all is based upon the exception contained in a proviso.[15] The distinct purpose of Congress, emphatically set out in the act, was to abandon the field of regulation to the states, where the power traditionally lay.[16] Ju-

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[15] McCarran-Ferguson Insurance Regulation Act, § 2 (b), as amended 61 Stat. 448, 15 U. S. C. A. § 1012 (b), quoted in text, supra.

[16] McCarran-Ferguson Insurance Regulation Act, § 1, 59 Stat. 33, 15 U. S. C. A. § 1011, quoted in text, supra.

dicial knowledge may be taken of the fact that, in view of the responsibility which lay on the individual states to regulate this business when by hypothesis there could be no federal regulation,[17] the field was well covered both in the states of origin of the corporations and in the states of dissemination of advertising and of written policies. In the time zone which Congress deliberately created for the purpose,[18] state legislation to fill lacunae in regulation was widely enacted, as was the intention. A major portion controls the corporation in the place of its incorporation or where it has its principal place of business. But it must not be forgotten that many states scrupulously control the media of dissemination of policies, such as brokers, agents and advertising of foreign corporations engaged in the insurance business within the territorial jurisdicton thereof. In initiating a scheme of regulation of strictly interstate negotiation and sale of insurance policies, it might have been well for the Commission to establish as to two different states what the limits of such business are. Of course, this Court is not attempting to set boundaries to the jurisdiction of the Commission, but rather to seek a solution for the problem at bar.

The trial court should then have considered the second proposition. It should have found affirmatively upon the question whether the broad demand for the testimony and documents covering the whole field of

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[17] Before the decision in *United States* vs. *South-Eastern Underwriters Association*, 322 U. S. 533, rehearing denied 323 U. S. 811, it had been consistently held for many years that insurance was not "commerce." *Paul* vs. *Virginia*, 75 U. S. 168, 183; *New York Life Insurance Co.* vs. *Deer Lodge County*, 231 U. S. 495.

[18] McCarran-Ferguson Insurance Regulation Act, § 2 (b), as amended, 61 Stat. 448, 15 U. S. C. A. § 1012 (b), quoted in text, supra.

intrastate operation in California [19] and that in other states, which respectively attempted to legislate with regard to advertising in the field of insurance, was arbitrary and unreasonable or not.

The decisive point, however, encompasses all these phases. There was no examination by the District Court of the relevancy and pertinence of the testimony and documents demanded to any matter into which the Commission was empowered by statute to inquire.[20] Section 6 of the Administrative Procedure Act provides in part:

> "Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law * * *." Administrative Procedure Act, § 6 (c), 60 Stat. 240, 5 U. S. C. A. § 1005 (c).

It may be incumbent upon the trial court to place limitation upon the subpoena. So only could the demand be sustained "to the extent that it is found to be in accordance with law." This Court is of the opinion that the subpoena was so broad on its face and the implications of the complaint upon which it was based are so farreaching that it would have been almost impossible to frame appropriate phrases of limitation. If the subpoena be enforced without regard to the relevance of the testimony sought to the areas over which the Commission has established jurisdiction, the ruling would not only be unfair to the company, but

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[19] See *Federal Trade Commission* vs. *American Tobacco Co.*, 264 U. S. 298, 307.

[20] Federal Trade Commission Act, § 9, 38 Stat. 722, 15 U. S. C. A. § 49.

could be quoted as a precedent for an unlimited authority for investigation and discovery in the field of insurance, whether intrastate or interstate. The agency could have limited the subpoena itself so as to have raised the question of its power by particularizing the demand. If the demand had been confined to records relevant to interstate commerce with another single state such as Montana, where there is probably the least regulation of advertising by a foreign corporation in the insurance area,[11] a much closer question would have been presented. But decisions as to relevance as well as those as to reasonable or arbitrary exercise of power must have bases in facts.

We hold that not only did the District Court have jurisdiction to decide, but also that it is required to decide whether the statutes have withdrawn the power from the Commission to regulate the particular area of interstate commerce in insurance solely when the court is moved to enforce a subpoena so definite in demand for specific books or papers that the scope of authority may be defined. Since this present subpoena demanded in mass all books, papers and records of the Indemnity Company including those relating to the intrastate business of that company in California, wherein Fireman's Fund was incorporated, the order of enforcement was too broad. While it may be the duty of the court to enforce a subpoena insofar as the demand be "in accordance with law,"[12] here the phraseology was such that the court had no means of segregation of items, if any, over which the

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[11] And, even in Montana, there is general legislation governing false statements in advertising. Montana Revised Code, § 94–1819, which would seem to be specifically applicable to "any insurance company * * * organized in this state, or in any other state." Montana Revised Code, § 40–1106.

[12] Administrative Procedure Act, § 6 (c), 5 U. S. C. A. § 1005 (c), quoted supra.

Commission had jurisdiction from those as to which Congress had explicitly denied them authority. *Hale* vs. *Henkel,* 201 U. S. 43; *Federal Trade Commission* vs. *American Tobacco Company,* 264 U. S. 298. The subpoena in the instant case is not sufficient to present the question of jurisdiction, if any, remaining to the Commission. The proceeding should be dismissed.

Reversed.

(Endorsed:) Opinion Filed Feb. 27, 1957.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 14972

JAMES F. CRAFTS, APPELLANT

vs.

FEDERAL TRADE COMMISSION, APPELLEE

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is reversed.

(Endorsed:) Judgment.
Filed and Entered: February 27, 1957.

PAUL P. O'BRIEN, *Clerk.*

APPENDIX C

In the Supreme Court of the United States

No. ——, October Term, 1956

FEDERAL TRADE COMMISSION, PETITIONER

vs.

JAMES F. CRAFTS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 27th, 1957.

/sgd/ WM. O. DOUGLAS,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of May, 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957